Japan’s Comments on the Draft General Comment on Article 15 of

the International Covenant on Economic, Social and Cultural Rights

In response to the Note Verbale of the Office of the High Commissioner for Human Rights (2020-1/CESCR/GC) dated 7 January 2020, the Government of Japan would like to submit the following comments on the Draft General Comment on article 15 of the International Covenant on Economic, Social and Cultural Rights (the Covenant), after careful consideration of the draft.

1 Overview

The Government of Japan understands that the General Comments of the Committee on Economic, Social and Cultural Rights is the Committee’s view on interpretation of the Covenant, and it does not change or revise the provisions of the Covenant and is not legally binding to the States Parties. The Government of Japan also believes that careful consideration is required when the General Comments refer to fields and matters stipulated by other treaties. It is important for the Committee to produce additional value when making its General Comments, within the scope of the Covenant, taking into consideration the above-mentioned aspects.

2 Specific Comments

**V. Special topics of broad application**

**C. Privatization of scientific research and intellectual property (IP)**

[General remarks]

Article 15 of the International Covenant on Economic, Social and Cultural Rights (CESCR) stipulates that the States Parties to the present Covenant recognize the right of everyone to enjoy the benefits of scientific progress and its applications and that the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. In addition, it is also stipulated that the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. The IP system is one such “step” which is indispensable for the “development and the diffusion of science”.

The Committee’s concerns over privatization of scientific research and IP are pointed out in “C. Privatization of scientific research and IP” of “V. Special topics of broad application” in the Draft General Comment on article 15 of the CESCR. The Government of Japan considers these concerns to be based on an incorrect and biased view, which unduly emphasizes the possible negative effects of privatization of scientific research and IP, and believes that the inclusion of such concerns in the adopted General Comment would lead to the distortion of understanding regarding the essence of Article 15. Therefore, this part should be re-written with substantial reference to the important roles that IP plays in research and development (R&D) and innovation in a rational and objective manner; and if it is difficult to do so, IP should not be included in the General Comments and “C. Privatization of scientific research and IP” should be deleted altogether.

[Comments regarding each paragraph]

In “C. Privatization of scientific research and IP” of “V. Special topics of broad application” in the Draft General Comment, it is claimed that IP can negatively affect the advancement of science, including investments in scientific research and access to its benefits.

In paragraph 65, such negative effects are highlighted as follows:

(1) IP can create distortions in funding of scientific research as private financial support might go only to research projects that are profitable and there may not be adequate financial support or may be a lack of funding for research that is crucial for the general welfare of society but does not seem financially attractive for business;

(2) IP can also block the necessary sharing of results of scientific research and its methods; and

(3) IP poses very serious obstacles for persons wishing to access the benefits of scientific progress, which might also be crucial for the enjoyment of other Economic, Social and Cultural Rights (ESCRs).

However, regarding (1), the IP system in and of itself does not necessarily have a direct connection with profitability. For example, patents are granted to inventions which fulfill objective requirements such as novelty and an inventive step, irrespective of whether profits can be gained from the invention. Patent rights can be granted to inventions that are not profitable and the acquisition of patent rights may even facilitate investments in such inventions. Furthermore, private companies, for example, make tremendous contributions to the development of new pharmaceuticals for neglected tropical diseases through funds such as the Global Health Innovative Technology Fund. Such facts illustrate that the description in paragraph 65 is not necessarily true.

Regarding (2), under the patent system, new technologies claimed in patent applications are to be widely disclosed to the public after a certain period has passed from the filing date of patent applications. This means that a patent system plays a key role in preventing research results from being kept secret and facilitates sharing of research outcomes and access to the benefits of scientific progress. Therefore, the current description disregarding such an important aspect of the patent system is inappropriate.

Regarding (3), IP rights can provide incentives for new R&D activities and play important roles in contributing greatly to the promotion of innovation and the development of science technology. For example, R&D activities in the field of pharmaceuticals entail enormous costs and need to be conducted over long periods of time. If there were no appropriate protection under the IP system, inventions of new medicines would diminish and it would, in turn, lead to negative effects on global health. The significance of IP in the field of pharmaceuticals has also been widely recognized worldwide, as WHO pointed out in its report[[1]](#footnote-1). The current description, which treats IP as just an obstacle, ignores the important role of IP in this context and is therefore inappropriate.

In this way, the IP system plays very important roles in promoting R&D activities and innovation. The content of this section, which lacks sufficient description of such roles, is not based on a correct understanding of IP. As a consequence, the steps to be taken by states to avoid the possible negative effects of IP mentioned in paragraph 66 of the Draft General Comment are also inappropriate.

First of all, in the beginning of paragraph 66, it is stated that “States have to take all steps to avoid the possible negative effects of IP”. However, as long as “the possible negative effects” described in paragraph 65 are incorrect and unbalanced as noted above, the steps taken to avoid “the possible negative effects” cannot be appropriate. In the process of taking steps to minimize the possible negative effects of IP, States should fully consider IP’s positive effects, such as the contribution to the development and diffusion of science, and take necessary measures in order not to undermine such positive effects.

Also, while in paragraph 66 the provision of adequate financial support and technical cooperation is recommended in order to counter distortions of funding associated with IP, it is inappropriate to identify IP as the cause of the distortion since various aspects are taken into account when private companies determine a project to which they provide financial support for research. There is a reasonable concern that States may take inappropriate measures, based on such improper recommendations in the Draft General Comment if they were to be included in the adopted General Comment.

Furthermore, paragraph 66 describes “States should make all efforts, in their national regulations and in international agreements on IP to avoid an ‘unacceptable prioritization of profit for some over benefit for all’” and indicates the public nature of IP. However, it is important to strike a balance between “profit” and “benefit for all”, bearing in mind that IP, which is a private right, contributes to the development and diffusion of science. Thus, it is unacceptable to encourage States to take steps to avoid only profitability based on the misunderstandings of the IP system mentioned above.

Therefore, as stated above, paragraphs 65 and 66 in particular should be re-written in a balanced manner, based on a correct and comprehensive understanding of IP. If this should prove difficult, one would have to say that this discussion regarding IP is one-sided and immature, with a disproportionate emphasis on the possible negative aspects of IP and therefore we would have to insist on deleting the entire description in “C. Privatization of scientific research and IP”.

1. Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property,

   http://www.who.int/phi/publications/Global\_Strategy\_Plan\_Action.pdf [↑](#footnote-ref-1)